WEE CHOO KEONG; HOUNG HAI HONG & ANOR

v.

MBf HOLDINGS BHD & ANOR & 3 OTHER APPEALS

SUPREME COURT, KUALA LUMPUR
TAN SRI DATO' HJ. LAMIN BIN HJ. MOHD YUNUS PCA
DATUK CHONG SIEW FAI FCJ
DATO' WAN ADNAN BIN ISMAIL FCJ
[CIVIL APPEALS NOS. 02-39-94, 02-40-94, 02-62-94, 02-63-94]
4 NOVEMBER 1995

CONTEMPT PROCEEDINGS: *Whether of a criminal character - Standard of proof - Whether that of proof beyond reasonable doubt - Breach of injunctive order - Evidence - Finding of guilt - Whether evidence sufficient to support charges.*

CONTEMPT PROCEEDINGS: *Committal order - Refusal to accept service of an order of Court - Contemnor sentenced to two years imprisonment - Whether punishment appropriate.*

These appeals were against the judgment of the learned Judge for committing the appellants to prison for breach of a Court order and for evading service thereof. The facts were that on 9 February 1993 the High Court at Kuala Lumpur had issued an *ex-parte* interlocutory injunction, prohibiting the appellants from making, printing, circulating or publishing allegations of impropriety against the respondents. Two days later, on 11 February 1993, three letters touching on the affairs of the repondents were found published and distributed out, in breach of the injunctive order. On the same date, also in breach of the order, copies of a letter which Bank Negara Malaysia (BNM) had sent the second appellant (Wee) way back in 1992, were found placed at two branch offices of the second respondent. These apart, almost instantly after the issuance of the order, depositors at the second respondent's branches at Raub and Mentakab in Pahang, for reasons unclear, made unusual withdrawals at the two branches amounting to some RM11,669,000.

The respondents alleged that the appellants had prepared the three letters aforesaid on 10 February 1993 in full awareness of the injunctive order prohibiting such act, that in breach of the Court order Wee had placed or caused to be placed the BNM's letter at the said second respondent's branch offices, and that, in further breach of the order, Wee had also divulged certain information to the depositors of the second respondent residing in Temerloh, Pahang, thereby causing the abnormal withdrawals. Evidence had also been led by which it was alleged that both the appellants had been in contempt for wilfully evading service of the injunctive order. The learned trial Judge found the appellants guilty of all the charges, and in consequence, sentenced Houng to two weeks imprisonment and RM20,000 fine in default six months imprisonment, and Wee to two years imprisonment, on each of the charges. The appellants appealed and before the Supreme Court the issues that arose were:

1. Whether, in contempt proceedings cases, the standard of proof required was that of proof beyond reasonable doubt.
2. If so, whether, bearing in mind the available evidence, and the burden of proof, the appellants could be said to have disobeyed the injunctive order, or refused service of the order.
3. If so, whether the committal order as meted out by the trial Judge, in the circumstances, was appropriate.

Held:

(A) By unanimous decision:

[1] In contempt of Court proceedings, the standard of proof required is proof beyond reasonable doubt, and where there is doubt, such doubt ought to be resolved in favour of the person charged. In other words, the proof must be of the standard as is required in a criminal case.

[2] The evidence on the allegation that the appellants had prepared or caused to be prepared the three offending letters on the night of 10 February 1993 came principally from Ting Tiew King (Ting). Ting, however, had given contradictory versions about the meeting with the appellants on that 10 February 1993, and more, the contradiction strikes at the very core of the charge. Ting's evidence was thus fatally flawed and ought therefore to be disregarded. Devoid of Ting's testimony, there is no or no sufficient evidence to substantiate the charge in question.

[3] There is no direct evidence that linked Wee to the charge of placing or causing to be placed the BNM's letter at the two branches of the second respondent. Nor is there sufficient evidence from which Wee's guilt could be safely inferred. Besides, Wee had deposed, which deposition the respondents had not disputed, that after his speech in Parliament on 10 and 11 September 1992, copies of the letter had been distributed out to reporters. The evidence adduced in respect of this charge is thus merely circumstantial, and is such that, taken separately and in totality, it falls far short of being capable of proving to the required standard of proof, that the acts thereof were done or caused to be done by Wee.

[4] The evidence adduced to support the allegation that Wee had made the telephone calls to the depositors between 10 February 1993 and 16 February 1993, thereby causing the abnormal withdrawals, is also far from satisfactory. The evidence falls far below the standard of proof required by law in contempt proceedings. There is insufficient evidence, direct or otherwise, capable of establishing or properly inferring, that Wee had made or caused to be made the telephone calls as alleged.

[5] The evidence adduced was insufficient for finding Houng guilty on both the offences. This Court therefore allowed his appeals and set aside the sentences. The evidence, likewise, was insufficient to find Wee guilty of the charge of disobedience of the Court order.

(B) By majority decision:

Per Lamin bin Hj. Mohd Yunus PCA (Wan Adnan bin Ismail FCJ concurring):

[1] Wee was not honest when he adverted his knowledge of the Court action by the respondents to a rumour, when he could simply telephone the respondents' solicitors or approach the High Court Registry to enquire. On the evidence, there is no doubt whatsoever that Wee had knowledge of his case before the High Court and the existence of the order issued against him by the morning of 10 February 1993. As it was the news about the issuing of the order appeared in the STAR newspaper of even date.

[2] There was no denial at any time by Wee that he was not in the firm that 10 February 1993. There was no statement by him that he was then out of town or out of Malaysia, or that, when he gave the instruction pertaining to the undertaking to accept service, he did it from outside the firm. In the circumstances, the inference is irresistable that Wee was in the firm when service of the cause papers together with the order was made. Wee's refusal to accept service of the order, being devoid of justification, amounts to an evasion of service. In any case, Wee's legal firm, being retained by Wee as his solicitors, and having undertaken

to accept service of the cause papers, was duty bound to accept service on behalf of Wee. Its refusal to do so, likewise, amounts to evading service.

[3] There was thus sufficient evidence to find Wee guilty of the offence of evading service of the Court Order. Wee's defence, at best, could only be termed as a bare denial. That being the case, there was absolutely no ground to give him the benefit of the doubt.

[4] For the offence committed by Wee, a fine rather than a committal order is more appropriate in the circumstances. The sentence of imprisonment is set aside and substituted with a fine of RM7,000.

Per Chong Siew Fai FCJ (dissenting):

[1] It was the respondents' case, as evidenced by their solicitors' letter dated 11 February 1993, that the Court order had been served or deemed to have been served on Wee. Since, as conceded, the Court order had been served, there can be no evasion of service by Wee.

[2] It was incumbent upon the respondents to prove beyond reasonable doubt, not only that Wee was in his office at the time the Court order was served, but also that the alleged acts by Ivan Wong were done on the instructions of Wee and were sufficient to constitute evasion of service of the order on the part of Wee. In the instant case, there is no direct or inferential evidence that Wee was in the office at the material time, or that he had instructed his solicitor Ivan Wong to refuse to accept service of the order. The evidence, taken in totality, had fallen short of proving against Wee, the charge of contempt by evasion of service of the said Court order.

[3] Ivan Wong had deposed that his refusal to accept service on 10 February 1993 on behalf of Wee was because of his belief, that the order had to be served personally on Wee and that therefore he had no authority to accept the same. It is thus probable that the failure to mention the Court order in the correspondence, and its return thereof, relate to genuine dispute of the propriety of service on point of law rather than to evasion of service of the order.

[Appeals by first appellant, together with appeal by second appellant in respect of disobedience of the Court order, allowed. Second appellant's appeal in respect of evasion of service of the Court order dismissed by majority decision, but his appeal against sentence allowed].

*[**Bahasa Malaysia** Translation of Headnotes]*

PROSIDING-PROSIDING PENGHINAAN: *Samada ianya bersifat jenayah - Standard bukti - Samada merupakan bukti yang melampaui keraguan yang munasabah - Kemungkiran perintah injunksi - Keterangan - Keputusan bersalah - Samada keterangan memadai untuk menyokong pertuduhan.*

PROSIDING-PROSIDING PENGHINAAN: *Perintah komital - Keengganan untuk menerima penyampaian perintah Mahkamah - Penghina dihukum penjara dua tahun - Samada hukuman wajar.*

Rayuan-rayuan ini adalah terhadap penghakiman Hakim yang bijaksana kerana menyerahkan perayu-perayu ke penjara atas kemungkiran perintah Mahkamah dan kerana mengelak penyampaiannya. Fakta-faktanya adalah bahawa pada 9 Februari 1993 Mahkamah Tinggi Kuala Lumpur telah mengeluarkan satu injunksi interlokutori *ex-parte*, yang melarang perayu-perayu daripada membuat, mencetak, mengelilingkan atau menerbitkan tuduhan-tuduhan tidak baik terhadap responden. Dua hari kemudiannya, pada 11 Februari 1993, terdapat 3 pucuk surat yang menyentuh hal-ehwal responden didapati telah diterbitkan dan diedarkan keluar, dalam

kemungkiran perintah injunksi tersebut. Pada tarikh yang sama, juga dalam memungkiri perintah tersebut, salinan-salinan surat yang telah dikirimkan oleh Bank Negara Malaysia (BNM) kepada perayu kedua (Wee) dalam tahun 1992, telah didapati terletak pada dua pejabat cawangan responden kedua. Selain daripada ini, sebaik sahaja pengeluaran perintah tersebut, pendeposit-pendeposit di cawangan-cawangan responden kedua di Raub dan Mentakab di Pahang, atas alasan-alasan yang tidak jelas, telah membuat pengeluaran-pengeluaran wang yang luarbiasa di kedua-dua cawangan tersebut yang berjumlah sebanyak RM11,669,000.

Responden-responden mengatakan bahawa perayu-perayu telah menyediakan ketiga-tiga surat yang tersebut di atas pada 10 Februari 1993 dengan mengetahui sepenuhnya tentang perintah injunksi yang melarang perbuatan sedemikian, bahawa dalam memungkiri perintah Mahkamah tersebut Wee telah meletakkan atau menyebabkan untuk diletakkan surat BNM itu di pejabat-pejabat cawangan responden kedua, dan bahawa dalam memungkiri perintah tersebut selanjutnya, Wee telah juga mendedahkan maklumat tertentu kepada pendeposit-pendeposit responden kedua yang bermastautin di Temerloh, Pahang, yang dengan itu telah menyebabkan pengeluaran wang yang luar-biasa itu. Keterangan telah juga dibangkitkan di mana telah dikatakan bahawa kedua-dua perayu telah melakukan penghinaan kerana dengan sengaja mengelakkan penyampaian perintah injunksi tersebut. Hakim yang bijaksana mendapati kedua-dua perayu bersalah atas kesemua tuduhan, dan berikutan itu telah menjatuhkan hukuman 2 minggu penjara terhadap Houng dan denda sebanyak RM20,000 atau jika mungkir penjara selama 6 bulan, dan terhadap Wee 2 tahun penjara, di atas setiap tuduhan. Perayu-perayu telah merayu dan di hadapan Mahkamah Agung isu-isu yang berbangkit adalah:

1. Samada, dalam kes-kes prosiding penghinaan, standard bukti yang dikehendaki adalah merupakan bukti di luar keraguan yang munasabah.

2. Jika demikian, mengambil perhatian tentang keterangan yang ada, dan beban membukti, samada perayu boleh dikatakan telah tidak mematuhi perintah injunksi tersebut, atau enggan menerima penyampaian perintah tersebut.

3. Jika demikian, samada perintah komital sepertimana yang dibuat oleh Hakim perbicaraan, dalam keadaan yang wujud, wajar.

Diputuskan:

(A) Melalui keputusan sebulat suara:

[1] Dalam prosiding-prosiding menghina Mahkamah, bukti standard yang dikehendaki adalah bukti di luar keraguan yang munasabah, dan di mana terdapat keraguan, keraguan sedemikian haruslah diputuskan memihak kepada orang yang tertuduh. Dalam ertikata yang lain, standard bukti tersebut mestilah sepertimana yang dikehendaki dalam suatu kes jenayah.

[2] Keterangan tentang pengataan bahawa perayu telah menyediakan atau menyebabkan tersedianya ketiga-tiga surat yang menyalahi itu pada malam 10 Februari 1993 secara utamanya diterima daripada Ting Tiew King (Ting). Ting walaubagaimanapun telah memberikan versi yang bercanggahan mengenai perjumpaan dengan perayu pada 10 Februari 1993 itu, dan lebih dari itu, percanggahan ini mengena tepat pada tuduhan-tuduhan yang berkenaan. Keterangan Ting dengan itu adalah tidak sempurna dengan cara yang membantutkan dan dengan itu harus tidak dipedulikan. Dengan ketiadaan testimoni Ting, tidak akan terdapat atau tiada keterangan yang memadai bagi menyokong tuduhan yang dipersoalkan.

[3] Tidak terdapat keterangan yang tepat yang menghubung-kaitkan Wee kepada tuduhan meletakkan atau menyebabkan untuk diletakkan surat BNM tersebut di kedua-dua cawangan responden kedua. Tidak juga terdapat keterangan yang mencukupi daripada mana kesalahan

Wee boleh diandaikan dengan selamatnya. Tambahan lagi, Wee telah mendeposkan, yang mana deposisi itu tidak dipertikaikan oleh responden, bahawa selepas ucapannya di Parlimen pada 10 dan 11 September 1992, beberapa salinan surat tersebut telah diedarkan kepada wartawan-wartawan. Keterangan yang dikemukakan berhubung dengan tuduhan ini adalah dengan itu semata-mata keterangan keadaan, dan adalah sedemikian rupa, bilamana diambil berasingan dan secara keseluruhan, ianya tidak akan berupaya untuk membuktikan menurut standard bukti yang diperlukan, bahawa perbuatan-perbuatan itu telah dilakukan atau disebabkan untuk dilakukan oleh Wee.

[4] Keterangan yang dikemukakan bagi menyokong pengataan bahawa Wee telah membuat panggilan-panggilan telefon kepada pendeposit-pendeposit responden kedua antara 10 Februari 1993 dan 16 Februari 1993, dan dengan itu telah menyebabkan pengeluaran wang yang luar-biasa, adalah jauh daripada memuaskan. Keterangan yang dikemuka jauh di bawah standard bukti yang dikehendaki oleh undang-undang dalam prosiding-prosiding penghinaan. Tidak terdapat keterangan yang mencukupi, samada keterangan secara langsung atau sebaliknya, yang boleh menetapkan atau memberikan andaian yang wajar, bahawa Wee telah membuat atau menyebabkan dibuat panggilan-panggilan telefon tersebut sepertimana yang dikatakan.

[5] Keterangan yang dikemukakan adalah tidak mencukupi bagi memutuskan Houng bersalah atas kedua-dua kesalahan tersebut. Mahkamah ini dengan itu membenarkan rayuannya dan mengenepikan hukuman tersebut. Keterangan juga adalah tidak mencukupi bagi mendapati Wee bersalah atas tuduhan tidak patuh kepada perintah Mahkamah.

(B) Melalui keputusan majoriti:

Oleh Lamin bin Hj. Mohd Yunus PMR (Wan Adnan bin Ismail HMP menyetujui):
[1] Wee tidak jujur ketika beliau merujuk pengetahuannya mengenai tindakan Mahkamah oleh responden kepada suatu khabar angin, sedangkan beliau hanya perlu menalipon peguamcara responden atau pergi ke Pejabat Pendaftaran Mahkamah Tinggi untuk bertanya. Atas keterangan, tidak terdapat keraguan apa pun bahawa pada pagi 10 Februari 1993, Wee telah mengetahui mengenai kesnya di hadapan Mahkamah Tinggi dan kewujudan perintah yang telah dikeluarkan terhadapnya. Sepertimana halnya disini, berita mengenai pengeluaran perintah tersebut, disiarkan oleh akhbar STAR pada tarikh yang sama.

[2] Tidak terdapat penafian pada bila-bila masa pun oleh Wee bahawa beliau tidak berada di firma tersebut pada 10 Februari 1993 itu. Tidak terdapat kenyataan oleh beliau bahawa beliau telah ke luar daerah atau ke luar Malaysia, atau bahawa, ketika beliau memberi arahan berhubung dengan akujanji untuk menerima penyampaian, beliau telah melakukannya di luar firma tersebut. Dalam keadaan yang sedemikian, inferens tidak dapat dielakkan bahawa Wee berada dalam firma tersebut ketika penyampaian kertas-kertas guaman bersama-sama dengan perintah tersebut dibuat. Keengganan Wee untuk menerima penyampaian perintah tersebut, dengan ketiadaan justifikasi, membawa kepada pengelakkan penyampaian. Walau apa pun, firma undang-undang Wee, yang dilantik oleh Wee sebagai peguamcaranya, setelah mengakujanji untuk menerima peyampaian kertas-kertas guaman bagi pihak Wee, adalah terikat dengan kewajipan untuk menerima penyampaian bagi pihak Wee. Keengganannya untuk melakukan sedemikian, juga membawa kepada pengelakkan penyampaian.

[3] Dengan itu terdapat keterangan yang mencukupi bagi mendapati Wee bersalah atas kesalahan mengelakkan penyampaian Perintah Mahkamah tersebut. Pembelaan Wee, pada tahap terbaiknya, hanya boleh dikatakan suatu penafian semata-mata sahaja. Oleh hal yang demikian, tiada alasan untuk memberikan kepadanya apa-apa manafaat keraguan.

[4] Bagi kesalahan yang telah dilakukan oleh Wee, dalam halkeadaan yang wujud, denda adalah lebih wajar dari suatu perintah komital. Hukuman penjara adalah dengan itu diketepikan dan digantikan dengan hukuman denda sebanyak RM7,000.

Oleh Chong Siew Fai HMP (membantah):

[1] Ianya merupakan kes responden, sepertimana yang diterangkan oleh surat peguamcara mereka bertarikh 11 Februari 1993, bahawa perintah Mahkamah telah disampaikan atau dianggap sebagai telah disampaikan ke atas Wee. Oleh sebab, seperti yang diakui, perintah Mahkamah tersebut telahpun disampaikan, tidak mungkin terdapat pengelakan oleh Wee.

[2] Ianya menjadi tanggungjawab responden untuk membuktikan di luar keraguan yang munasabah bukan sahaja Wee berada di pejabatnya ketika Perintah Mahkamah tersebut disampaikan, tetapi juga perbuatan-perbuatan Ivan Wong yang dikatakan itu telah dilakukan atas arahan Wee dan memadai bagi menjadikannya satu pengelakan penyampaian perintah di pihak Wee. Dalam kes semasa tidak terdapat keterangan yang tepat atau yang boleh diandaikan bahawa Wee berada di pejabat pada waktu yang material itu, atau bahawa beliau telah mengarahkan peguamcaranya Ivan Wong untuk enggan menerima penyampaian perintah tersebut. Keterangan pada keseluruhannya tidak dapat membuktikan terhadap Wee, tuduhan penghinaan tersebut melalui pengelakan penyampaian perintah Mahkamah.

[3] Ivan Wong telah mendeposkan bahawa keengganannya untuk menerima penyampaian pada 10 Februari 1993 bagi pihak Wee adalah kerana kepercayaannya, bahawa perintah tersebut haruslah disampaikan ke atas diri Wee dan bahawa dengan itu beliau tidak mempunyai kuasa untuk menerimanya. Ianya dengan itu mungkin bahawa kegagalan untuk menyebut perintah Mahkamah dalam perutusan surat tersebut, dan pengembaliannya, adalah disebabkan oleh suatu pertikaian tulen mengenai keesahan penyampaian di sisi undang-undang, dan bukan kerana mengelak penyampaian perintah tersebut.

[Rayuan-rayuan oleh perayu pertama, bersama dengan rayuan oleh perayu kedua berhubung ketidak-patuhan perintah Mahkamah, dibenarkan. Rayuan perayu kedua berhubung dengan pengelakan penyampaian perintah Mahkamah ditolak dengan keputusan majoriti, tetapi rayuannya terhadap hukuman dibenarkan].

Cases referred to:

The Aligarh Municipal Board & Ors. v. Ekka Tonga Mazdoor Union & Ors. [1970] AIR SC 1707 ***(foll)***

Loot Ting Yee v. Tan Sri Sheikh Hussein bin Sheikh Mohamed & Ors. [1982] 1 MLJ 321 ***(refd)***

Montgomery v. Montgomery [1964] 2 All ER 22 ***(cit)***

Garden Cottage Foods v. MMB [1983] 2 All ER 770 ***(cit)***

Wee Choo Keong v. MBf Holdings & Anor and Another Appeal [1993] 2 MLJ 219 ***(refd)***

Khoon Chye Hin v. P.P. [1961] 27 MLJ 105 CA ***(refd)***

Tay Bok Choon v. Tahansan Sdn. Bhd. [1987] 1 MLJ 433 ***(refd)***

Tay Seng Keng v. Tay Ek Seng Co. Sdn. Bhd. [1978] 1 MLJ 126 FC ***(foll)***

In Bramblevale Ltd. [1970] 1 Ch. 128 ***(foll)***

Dean v. Dean [1987] 1 FLR 517 CA ***(foll)***

Attorney-General v. Newspaper Publishing Plc. & Ors. [1988] Ch. 333, CA 362 ***(foll)***

Savings & Investment Bank Ltd. v. Gasco Investments (Netherlands) BV & Ors. (No. 2) [1988] TAER 975 ***(refd)***

Caswell v. Powell Duffryn Associated Collieries Ltd. [1940] AC 152 HL ***(refd)***

Legislation referred to:

Rules of the High Court 1980 O. 52 r.2(2), 62 r. 13

For the first appellant - Christopher Fernando (Ivan Wong with him); M/s. Karpal Singh & Co.
For the second appellant - Raja Aziz Addruse (Wee Choo Chin with him); M/s. Karpal Singh & Co.
For the respondents - Loh Siew Cheang (Tay Hong Huat, Evelyn Khoo & Ranjit Singh with him); M/s. Cheang & Ariff

JUDGMENT

Lamin bin Hj. Mohd Yunus PCA:

This is an appeal by the 1st and the 3rd defendants against the decision of the Judge of the High Court who on 31 December 1993, found them guilty of contempt. They were sentenced on 28 January 1994. The 1st defendant was sentenced to two weeks imprisonment and RM20,000 fine in default 6 months imprisonment for the offence of disobedience of the Court order as per plaintiff's application for committal in Enclosure 27. For the offence of evading the service of the same order as per plaintiffs' application for committal in Enclosure 102, he was also sentenced to two weeks imprisonment and RM20,000 fine in default 6 months imprisonment. The 3rd defendant, on the other hand, was sentenced to two years imprisonment for each of the two offences. They were to run concurrently.

(The 2nd defendant was absent throughout the whole proceedings before the Court below.)

For the purposes of the present appeal we refer to the 1st defendant as the 1st appellant while the 3rd defendant as the 2nd appellant.

Upon reading the records and hearing the arguments before us, we were unanimous in our finding with respect to the 1st appellant that the evidence was insufficient to find him guilty for both the offences. We therefore allowed the appeals and set aside the sentences.

With regard to the 2nd appellant (3rd defendant), we were also unanimous in our finding but only in respect of the offence of disobedience of the Court order for the same reason. We therefore allowed the appeal and set aside both the finding of guilty and the sentence as imposed. For the offence of evading the service of the Court order, we by a majority decision, agreed with the finding of guilty by the learned Judge below but disagreed with the sentence imposed. We therefore dismissed the appeal on the finding of guilty and allowed the appeal on sentence. We set aside the sentence of imprisonment and substituted it with a fine in the sum of RM7,000.

However we in the majority wish to add to what has been said by the learned Judge below the following. We noted that the firm of Wee Choo Keong and Faaiz on 10 February 1993 wrote to Messrs Cheang & Ariff, solicitors for the plaintiff and informed them that they were acting for the 2nd appellant. The sentence that followed which we will quote here, is of great significance and it reads:

> We have been informed by our client that our client has heard a rumour that your clients have filed a summons against our client.

It is amazing that in the context in which the letter was written, a professional could use the word "rumour". Firstly, why the need to write to the other side merely to say that information was only a "rumour". He could simply telephone. He was in Jalan Raja Laut while the other at Jalan Yap Kwan Seng. From Jalan Raja Laut he could even walk to the High Court Registry to enquire. He could have got a clear-cut answer. Again the news about the case including the issuing of the order appeared in the STAR the same day (10 February 1993). For a politician especially one residing in a city, and for that matter almost anyone the first item on the breakfast menu is the morning papers. We were more than convinced that the 2nd

appellant knew about the case and the existence of the order in the morning of 10 February 1993. By employing the word "rumour" we could not equate the mind of the writer of the letter to the innocent mind of a newly born babe. By that we simply mean that the 2nd appellant was not honest.

Further two days before (8 February 1993) there was wide publicity in the Chinese newspapers, such as Nanyang Siang Pau (02-40-94 Vol. C p. 679), Sin Chew Jit Poh (02-40-94 Vol. C p. 680), Shin Min Daily News (02-40-94 Vol. C p. 683) about the lodging of a police report by the 2nd appellant (3rd defendant) against Tan Sri Dato' Loy Hean Hong regarding certain business transactions which the 2nd appellant considered illegal. With that kind of accusations contained in a police report and made public through the media, one can only expect for the 2nd appellant to be anxious as to the result of the publicity of his police report. Therefore we would be surprised if he did not closely watch the media for its further development. We therefore had no doubt whatsoever that the 2nd appellant had knowledge of his case before the High Court and the existence of the order issued against him by the morning of 10 February 1993. His solicitors' letter of 10 February 1993 (Exh. SM1: TL4) begins with the words "We act for Mr. Wee Choo Keong ..." on a letter-head of the firm of Wee Choo Keong & Faaiz. This shows that his own firm was acting for him and the letter further asks for "all the cause papers" to be served on the firm. In that case O. 62 r. 13 of the Rules of the High Court 1980 should apply so that "all writs, notices, pleadings, summonses, orders ... " would be served on the solicitor who was acting for his client. The firm of Wee Choo Keong & Faaiz had no valid ground to refuse the service of the order.

In the case before us the 2nd appellant is the senior partner of his own firm. The solicitors retained by him were no other than his own firm. On his instruction, his own firm undertook to accept service of all cause papers. The papers were served at the premises of his own firm. The letter of undertaking to accept service was sent and received on the same day. The service was done the same afternoon. There was no denial at any time by the 2nd appellant that he was not in the firm that day. There was no statement by him that he was out of town or out of Malaysia that day. There was no statement from him or his firm to the effect that when he gave the instruction pertaining to the undertaking to accept service that he did it from outside the firm. In the circumstances, by our judgment in this case, we say firstly that by an irresistable inference that the 2nd appellant was in the firm when the service of the cause papers together with the order was made. According to S. Mahendran, the process server, after he handed over to Ivan Wong the cause papers together with the order, Ivan Wong went into the "inner office". According to Ivan Wong he took the cause papers "to a large conference table in our library" as the receptionist table was too small. We say there are only a few documents and one does not need a conference table. It was only a lame excuse. He went in to consult the 2nd appellant. Secondly we say that after having given the undertaking to accept service, his firm was duty-bound to accept the service of the order. Being in the same firm there was absolutely no difficulty in consulting the 2nd appellant there and then and the refusal to accept service of the order had no justification whatsoever. Thirdly we say that even assuming that the 2nd appellant was not in when the process server came, Ivan Wong in particular or whoever in the firm in fact acting for him was duty-bound to inform the process server where the 2nd appellant could be reached after having told him that the order was required to be served personally. Ivan Wong and the firm were silent on this. However we repeat that the 2nd appellant was present in the firm at the time of service and the refusal to accept service of the order amounted to an evasion of service. Also we wish to repeat that in the circumstances of this case, that the 2nd appellant's own firm in the capacity of retained solicitors was duty-bound to accept service on behalf of the 2nd appellant and its refusal to accept service amounted to evading service.

Again with the use of the word "rumour" and if this is to be taken that both the 2nd appellant and his firm (being his solicitors) had no factual knowledge of the case having been filed, meaning that it was truly a rumour then even at the stage of "rumour" both the 2nd appellant and his solicitors were already making an effort to ascertain whether there was already a case filed against the 2nd appellant and in that light it is reasonable to conclude that they were too eager to be served with the cause papers in order to know the nature of the case against the 2nd appellant. But when the process server came to effect service and after having perused all the documents, they found an order of the Court and after having realised the purport of the order, they refused to accept service. Since they were too eager to be served with the cause papers and to know the nature of the case, it was reasonable to conclude that the 2nd appellant must have been in the firm when the process server came. In the present case, as we have said earlier both the client and his solicitors were in the same firm and occupying the same premises and that there was no evidence from the firm that the 2nd appellant could not be contacted (being eager to know the nature of the case he must have been around). It was therefore at his own peril that he and his firm refused to accept service of the order.

In the matter of defence, there was absolutely no ground to give the 2nd appellant the benefit of the doubt. At best his defence could only be termed as a bare denial.

As regards sentence we were of the view that in the circumstances of the case, a fine of RM7,000 was reasonable.

Wan Adnan bin Ismail FCJ:

I have had the advantage of reading the judgment of Y.A.A. Tan Sri Dato' Hj. Lamin Bin Hj. Mohd. Yunus, the President of the Court of Appeal dated 4 November 1995.

I agree that the appeal by the first appellant (the first defendant) be allowed and the sentences imposed be set aside. I also agree that the appeal of the 2nd appellant 3rd defendant) in respect of the offence of the disobedience of the Court order be allowed and the sentences imposed be set aside and I agree that for the offence of evading service of the Court order there was sufficient evidence for the learned trial Judge to find him guilty thereof. I also agree that for this offence a fine of RM7,000 is appropriate in the circumstances of the case.

I like to respond to two legal points raised in arguments by the learned Counsel for the second appellant (third defendant). But first I like to say something on the standard of proof that is required to prove a charge in contempt of Court proceedings. It is already well established that in contempt of Court proceedings proof must be proof beyond resonable doubt and that where there is a doubt the doubt ought to be resolved in favour of the person charged. In other words, the proof must be of the standard as is required in a criminal case.

In *The Aligarh Municipal Board & Ors. v. Ekka Tonga Mazdoor Union & Ors* [1970] AIR Supreme Court 1707 it was held:

> In order to bring home a charge of contempt of Court for disobeying orders of Courts those who assert that the alleged contemners had knowledge of the order must prove the fact beyond reasonable doubt ... In case of doubt, however, the benefit ought to go to the person charged.

In *Loot Ting Yee v. Tan Sri Sheikh Hussein bin Sheikh Mohamed & Ors.* [1982] 1 MLJ 321 the applicant had applied to the High Court to commit the respondents for alleged contempt of Court. The application was dismissed in the High Court and in the Federal Court. The applicant then applied for leave to appeal to the Yang Di Pertuan Agong.

Suffian LP (as he then was) on behalf of the Federal Court said:

> With respect we are of the opinion that the learned trial Judge's decision was a criminal matter and therefore there was no right of appeal beyond the Federal Court.

In *re Bramblevale Ltd.* [1970] Law Report 1 Ch. 128 Lord Denning said:

> A contempt of Court is an offence of a criminal character. A man may be sent to prison for it. It must be satisfactorily proved. To use the time-honoured phrase, it must be proved beyond reasonable doubt. It is not proved by showing that, when the man was asked about it, he told lies. There must be some further evidence to incriminate him.

The learned Counsel for the second appellant (third defendant) had submitted that the injunction order dated 9 February 1993 ought not to have been issued by the Court because,

(1) a Court would grant an injunction only to support a legal right. (*Montgomery v. Montgomery* [1964] 2 All ER 22) and there was no legal right of the plaintiffs to be protected.

(2) the injunction granted was too wide. An injunction must be precise. (*Garden Cottage Foods v. MMB* [1983] 2 All ER 770).

(3) the injunction order was made without jurisdiction.

In my view these points are not relevant in contempt of Court proceedings. They are relevant and may be valid in a proceeding to set aside the injunction. In the instant case the interim injunction order was made *ex-parte*. Until and unless it is set aside the order is valid and must be obeyed. In my view the correct position is that once an interim injunction has been granted it must be obeyed. If the person against whom the order is made feels that the injunction order ought not to have been made for any reason he must apply to have it set aside. Until it is set aside he must respect and obey it. (see *Wee Choo Keong v. MBf Holdings* & Another and Another Appeal [1993] 2 MLJ 219).

The other point submitted by the learned Counsel for the second appellant (third defendant) was that the trial Judge should have heard the defendants' application to set aside the interim injunction first before hearing the plaintiff's application for committal. The decision of the learned trial Judge refusing the defendants' application to be heard first went to the Supreme Court on appeal and the Supreme Court had dismissed the appeal.

In my view, even if the trial Judge had allowed the defendants to proceed first with their application to set aside the injunction order and if they had succeeded in setting aside the order, this would not affect the culpability of the defendants for their disobedience of the injunction order before it was set aside if the allegations of disobedience had been proved. The contempt of Court had been committed before the discharge of the order. There would not have been any difference.

Chong Siew Fai FCJ:

Introduction

Before us, there were 2 appellants:

(1) Wee Choo Keong (hereinafter referred to as 'Wee') in Appeals numbered 02-39-94 and 02-62-94; and

(2) Houng Hai Kong (hereinafter referred to as 'Houng') in Appeals numbered 02-40-94 and 02-63-94.

They were respectively the 3rd and the 1st defendants in High Court Civil Suit No. S4-22-75-93. Each of them was charged with contempt of Court as follows:

(a) disobeying the terms of an injunction order of Court (*ex-parte*) dated 9 February, 1993; and

(b) evading service of the said *ex-parte* Court order dated 9 February, 1993.

The High Court at Kuala Lumpur found each of them guilty of the 2 charges for which the following punishments were imposed:

(1) Wee was sentenced to 2 years imprisonment for each charge; and

(2) Houng was sentenced to 2 weeks imprisonment and fined RM20,000 in default 6 months imprisonment for each charge.

Stay of execution of the sentences was granted.

Against the decisions, the 2 appellants appealed. All the 4 appeals were heard together.

On 14 February, 1995 the 2 appeals by Houng were unanimously allowed with costs here and below. The imprisonment sentences and the fines were set aside. Wee's appeal against disobedience of the Court order dated 9 February 1993 was unanimously allowed with costs here and below. The two-year imprisonment sentence was set aside. His appeal against the contempt for evasion of service of the said Court order was, by a majority decision of two to one, dismissed with costs to the respondents, and the imprisonment sentence of two years was altered to one of fine of RM7,000.

Disobedience of the Court Order

In the case of Wee (similarly in the case of Houng), my brother Judges and I agreed that the evidence adduced was insufficient for finding him guilty of the charge of disobedience of the Court Order. I would, however, add the following observations.

The acts alleged to have been done by Wee constituting disobedience of the Court Order dated 9 February 1993 were:

(a) preparing or causing to be prepared 3 offending letters in the night of 10 February, 1993;

(b) placing or causing to be placed at the Auto Teller Machines at the Salak South and the Kepong branch offices of the 2nd respondent (2nd plaintiff), MBf Finance Berhad, photocopies of a letter dated 22 September, 1992 from Bank Negara Malaysia on 11 February 1993 at about 2.30 p.m. and 4.15 p.m. respectively;

(c) making or causing to be made between 10 February, 1993 and 16 February, 1993 telephone calls to the sub-committee of the Democratic Action Party at Sungai Ruan and to the depositors of the said MBf Finance Berhad residing in Temerloh dissipating certain information thereby causing abnormal withdrawals of RM11,669,000 from the Raub and the Mentakab branches of the said MBf Finance Berhad between 11 February 1993 and 16 February 1993.

Wee denied all the allegations against him.

As to (a) above (i.e. preparing or causing the preparation of the 3 offending letters in the night of 10 February 1993), the evidence came principally from Ting Tiew King (Ting). Ting, however, gave contradictory versions on the same subject-matter. In his affidavit made on 18 February, 1993 he said he and Wee were in the latter's office in the evening of 10 February,

1993 where Wee prepared one of the letters and asked him to sign; but subsequently in his statutory declaration made on 8 March 1993, he denied having met Wee after about 4 p.m. on 10 February 1993. He further said that he was "under tremendous fear, pressure, anxiety and confusion", had no legal advice, did not understand the contents and had no choice when he signed the affidavit, explaining the situation under which he signed. In the circumstance, Tings affidavit evidence, in our view, ought to have been ignored and not relied on.

Generally, as to the weight to be attached to the evidence of a witness who is shown to have lied, Thomson C.J. in *Khoon Chye Hin v. P.P.* [1961] 27 MLJ 105 CA observed (at p. 107):

> if a witness demonstrably tells lies on one or two points then it is clear that he is not a reliable witness and as a matter of prudence the rest of his evidence must be scrutinised with great care and indeed with suspicion.

In *Tay Bok Choon v. Tahansan Sdn. Bhd.* [1987] 1 MLJ 433 PC Lord Templeman said (@ p. 436):

> If allegations are made in affidavits by the petitioner and those allegations are credibly denied by the respondent's affidavits, then in the absence of oral evidence or cross-examination, the Judge must ignore the disputed allegations.

In the instant case under appeal, the situation is worse: the deponent, Ting, had himself made contradictory statements, and the contradiction strikes at the core of the charge. On the very point as to whether Ting was with Wee in the latter's office on 10 February 1993 doing the work as alleged, Ting's affidavit and his statutory declaration cannot both be true; one of them must necessarily be false. In the circumstance, Ting's evidence on the point must be disregarded. Devoid of Ting's testimony, there is no or no sufficient evidence to substantiate the point charged.

As regards item (b) (i.e. placing or causing to be placed photocopies of the letter from Bank Negara Malaysia at the Auto Teller Machines at the Salak South and the Kepong branches of MBf Finance Berhad on 11 February, 1993) there is no direct evidence linking Wee to this charge. Nor, in our view, is there sufficient evidence from which Wee's guilt could be validly and safely inferred. Wee, on the other hand, besides denying the charge, also deposed (and it was not disputed) that after his speech in the Parliament on 10 and 11 November 1992, he had, at the requests of many reporters, given away copies of the letter from Bank Negara Malaysia.

Furthermore, in view of the proximity of time between the service of the Court order dated 9 February, 1993 (10 February 1993, at about 4.25 p.m.) and the discovery of photocopies of Bank Negara Malaysia's letter at the Auto Teller Machines of the Salak South and Kepong branches of MBf Finance Berhad on 11 February 1993 at about 2.30 p.m and 4.15 p.m. (See Appeal Record of Civil Appeal No. 02-62-1994 at p. 217 para. 10), the time at which the photocopies of the letter were placed at the Auto Teller Machines aforesaid became crucial for the purpose of determining whether there was a breach of the injunction order dated 9 February 1993. For example, in point of time, there could be no breach of the Court order constituting contempt if the photocopies were placed at the Auto Teller Machines before the making of the order, or without knowledge of the order or before service of the order. in the judgment of the learned trial Judge, there is no specific finding as to the time the photocopies of the Bank Negara Malaysia's letter were placed at the said Auto Teller Machines.

The evidence adduced is circumstantial and is such that, taken separately or in totality, it falls far short of being capable of proving to the required standard in contempt proceedings (i.e. proof beyond reasonable doubt) that the acts or any thereof were done or caused to be done by Wee.

As regards item (c) (i.e. making or causing telephone calls to be made to the sub-committee of the Democratic Action Party and to depositors between 10 February 1993 and 16 February, 1993 thereby causing abnormal withdrawals of money from the 2 MBf Finance Berhad branches), the evidence adduced by the plaintiffs is again far from being satisfactory.

In the affidavit of Thomas Lee Koon Seng affirmed on 20 February 1993 verifying the statement filed pursuant to O. 52 r. 2(2), Thomas Lee relied on the reports (Exh. TL19) made by the branch managers and the senior managers of the MBf Finance Berhad and came to what he termed as "the only reasonable inference and conclusion" that Wee made or caused to be made the telephone calls. (See the Appeal Record Part B pp. 218 and 219 in Civil Appeal 02-62-1994). None of the reports said anything about Wee making telephone calls or causing them to be made. None of the managers who made the reports made any affidavit.

In the affidavit of Tan Hor Lee affirmed on 4 March 1993, Tan said that "sometime in February 1993" the exact date he could not recall, Wee, in a telephone conversation asked him to get some depositors of MBf Finance Berhad to withdraw their monies from the said Finance company, and that he (Tan) expressed that he had no ability to make the arrangement. Two points emerged significantly from the above statement:

(i) Tan was not sure of the date. All he could say was "sometime in February 1993". In the context of the present contempt proceedings, time is highly material. To constitute a contempt of Court through disobedience of the Court order made on 9 February 1993, the alleged act of contempt had to have taken place after the making of the Court order to the knowledge of the offender or after service of the order upon him. The term "sometime in February 1993" is vague and unhelpful in the circumstance.

(ii) On Tan's own evidence, he did not make the arrangement as allegedly requested by Wee. Wee, on the other hand, denied the allegation. Moreover, Tan's credibility was to an extent tainted by the affidavit evidence of Tee Swee and Teh Piah Teng alleging Tan conveying the message and prompting Tee to be witness for money. In their affidavits (including Tan's) there are also allegations and counter-allegations of matters the effect of which seriously affects credibility. It is not surprising that the learned trial Judge made no mention of the affidavits. In our view they hardly possess any evidential value on the issues in question.

In his grounds of judgment, the learned trial Judge made reference to the abnormal withdrawals of money from the Raub and the Mentakab branches of the MBf Finance Berhad, and concluded:

> Having regards to the events taking place from 9 February 1993, there is no doubt in my mind that the 3rd defendant had caused all these phone-calls to be made to Raub and Temerloh with the intention to cause injury and damage to the plaintiffs.

We have examined the evidence relevant to the issue. With the greatest respect, we are of the view that the evidence falls far below the standard of proof required by the law in contempt proceedings. There is no or insufficient evidence, direct or otherwise, capable of establishing or validly and properly inferring that Wee had made or caused to be made the telephone calls as alleged.

Evasion of Service of the Court Order dated 9 February 1993

As I dissented from the majority decision of dismissing Wee's appeal against contempt for evasion of service of the Court order dated 9 February 1993, 1 shall now give my reasons.

Law

Deliberate or intentional evasion of service of an injunction order of Court thereby constituting an interference with the administration of justice is a contempt of Court and is punished not for the purpose of vindicating the dignity of the Court, but to prevent the improper interference.

Though it is sought to commit a party to a civil action for contempt and the proceedings are interlocutory, the standard of proof is the criminal standard i.e. proof beyond reasonable doubt.

In *Tay Seng Keng v. Tay Ek Seng Co. Sdn. Bhd.* [1978] 1 MLJ 126 FC Gill CJ (Malaya) (as he then was) referred to *In re Bramblevale Ltd.* [1970] 1 Ch. 128 which required the proof of contempt of Court to be beyond reasonable doubt and obviously accepted the test when he said: (@ 127):

> ... it was quite impossible to say that the guilt of the appellant had been proved with such strictness of proof as is consistent with the test of 'beyond reasonable doubt".

In re Bramblevale Ltd. [1970] 1 Ch. 128 CA Lord Denning M.R. said: (@ 137):

> A contempt of Court is an offence of a criminal character. A man may be sent to prison for it. It must 'be satisfactorily proved. To use the time-honoured phrase. It must be proved beyond reasonable doubt.

See also *Dean v. Dean* [1987] 1 FLR 517 CA; *Attorney-General v. Newspaper Publishing Plc. & Ors.* [1988] Ch. 333 CA 362.

Motions

Before dealing with the plaintiffs' motion dated 13 May 1993 for contempt against Wee on ground of evasion of service, a brief recitation of an earlier motion of the plaintiffs against Wee; also for contempt, respecting which Wee was vindicated in this appeal, is necessary.

On 25 February 1993 (over 2 months before the above motion on evasion of service), the plaintiffs took out a motion for contempt against Wee alleging disobedience of the injunction order of the High Court made on 9 February 1993 on the part of Wee by several acts respecting which I have already dealt and of which Wee had been held not guilty in this appeal. What is of significance, however, is that in that first motion it was the case of the plaintiffs that the said Court order had been served or deemed to have been served on Wee on 10 February 1993 at about 4.25 p.m. - a complete about-turn of stand from that held by the plaintiffs in the 2nd motion where the plaintiffs contended that Wee had evaded service meaning that Wee had not been served on the date and time above-mentioned. An important point to note in this connection is that there is no evidence from either the process server S. Mahendran or his companion Leong Kwok Yan that they had, at any material time in that afternoon of 10 February 1993, expressed an intention or wish to serve Wee personally.

Judgment of the High Court

Holding that Wee had evaded service of the said Court order on 10 February 1993 at about 4.25 p.m. and was therefore in contempt, the learned trial Judge in his judgment:

(a) found that Wee instructed his legal firm "to accept service of all Court's matters including the order of the Court.";

With respect, the letter dated 10 February 1993 from M/s. Wee Choo Keong & Faaiz to M/s. Cheang & Ariff stated "all the cause papers pertaining to this matter". There is, on record, no evidence that Wee had specifically instructed accepting service of the Court order. Neither is there any evidence that prior to the arrival of S. Mahendran at Wee's solicitor's office on 10 February 1993, Wee and Ivan Wong knew that the Court order was to be served. But even on the basis that the term "cause papers" could be interpreted to include the Court order, it was, as mentioned above and will be further discussed later, the plaintiffs' own case that the Court order had been served on 10 February 1993 at about 4.25 p.m.

(b) believed that Wee was in his office when the plaintiffs' process server S. Mahendran arrived to effect service on 10 February 1993 at about 4.25 p.m., preferring what the receptionist (unidentified or unnamed) was said to have said that Wee was in the office to what Wee's secretary was purported to have said that Wee was not in;

I use the phrase "purported to have said" because, as will be shown later, there is, on record, no direct or credible evidence of the alleged utterance of the secretary.

(c) believed that Wee instructed Ivan Wong not to accept the Court order;

(d) held that Wee himself refused to acknowledge service of the Court order.

Evasion of Service - Grounds Relied on and Affidavit of Verification - Appeal

The grounds relied on by the plaintiffs in support of the complaint of Wee's evasion of service of the Court order are contained in the statement dated 12 May 1993 pursuant to O. 52 r. 2(2) with the affidavit of Thomas Lee Koon Seng (hereinafter referred to as "Thomas Lee") affirmed on 11 May 1993 verifying the facts relied on.

I shall now deal with Thomas Lee's said affidavit of verification (hereinafter referred to as verification - affidavit) in support of the facts alleged in the grounds contained in the said statement.

(1) In paragraph 6(iv) of the verification - affidavit (verifying paragraph 4(a)(iv) of the statement), Thomas Lee believed that Wee was in the solicitors' office on 10 February 1993 at about 4.25 p.m. and that Wee had instructed his (Wee's) secretary to inform the plaintiffs' process server (S. Mahendran) that Wee was not in the said office for the purpose of preventing or avoiding service of the Court order dated 9 February 1993. Thomas Lee's belief seemed to be based on his having been allegedly informed by S. Mahendran that on the latter's arrival at Wee's solicitors' office, a receptionist (unidentified or unnamed) had told him that Wee was in, but that subsequently after making known the purpose of his visit, Wee's secretary (also unidentified or unnamed) told him that Wee was not in.

But neither the secretary nor the receptionist gave evidence by affidavit or otherwise. It is noted that their evidence might not be readily forthcoming, being Wee's employees. But, more importantly, there is no evidence at all from S. Mahendran about what the secretary had allegedly told him. Thomas Lee was not in Wee's solicitors' office at the material time. In the circumstance, Thomas Lee's belief that Wee had, in the solicitors' office, instructed the secretary to say that he (Wee) was not in, being unsupported by evidence and evidence of stated source, has, in my opinion, hardly any evidential value especially considering the serious nature of the motion and the high standard of proof required i.e. one of proof beyond reasonable doubt. Although hearsay evidence is admissible in affidavit under O. 41 r. 5(2), the Court should ensure that no injustice results from its admission. *Savings & Investment Bank Ltd. v. Gasco Investments (Netherlands) BV & Ors.* (No. 2) [1988] TAER 975. True, Wee did not assert that he was not in the office at the relevant time on 10 February 1993.

However, since the criminal standard of proof is to apply, silence is no evidence that he was in the office and, more importantly, that he had instructed the secretary to say that he was not in, particularly that the secretary had not given evidence by affidavit or otherwise.

For the plaintiffs, it was contended that in paragraph 2 of Wee's affidavit dated 9 March, 1993, Wee did not deny that he had instructed Ivan Wong not to accept service. In my opinion, the circumstances did not call for Wee's response for the following reasons. The said paragraph 2 was in answer to paragraph 8 of Thomas Lee's affidavit affirmed on 20 February 1993. In the said paragraph 8 Thomas Lee did not allege that Wee had instructed Ivan Wong not to accept service. In other words the situation did not arise that Wee was bound to or even expected to deny since there is no specific or express allegation that he had instructed Ivan Wong not to accept service. The following remark of Lord Denning M.R. *In re Bramblevale Ltd.* [1970] 1 Ch. D 28 CA about contempt of Court is illustrative. He observed: (@ 137 A-B):

> It is not proved by showing that, when the man was asked about it, he told lies. There must be some further evidence to incriminate him. Once some evidence is given, then his lies can be thrown into the scale against him. But there must be some other evidence

Of course, Lord Denning M.R. was talking about lies from an alleged contemnor. But in the instant appeal, the plaintiffs' case is even worse. There is no direct evidence that Wee was in the office and gave the instructions as alleged. Neither S. Mahendran nor the secretary gave evidence to that effect. The belief of Thomas Lee about Wee's presence in the office and giving the instructions on 10 February 1993 at about 4.25 p.m. being unsupported by any evidence is devoid of basis and has hardly any evidential value.

It was suggested that Wee's presence in the office could be inferred. There is a clear distinction between a conjecture and an inference. A conjecture is not an inference. An inference must rest on premises of fact established by credible evidence. There can be no inference unless there is objective fact which the Court cannot discount. In *Caswell v. Powell Duffryn Associated Collieries Ltd.* [1940] AC 152 H.L. Lord Wright observed: (@ 169-170):

> Inference must be carefully distinguished from conjecture or speculation. There can be no inference unless there are objective facts from which to infer the other facts which it is sought to establish. In some cases the other facts can be inferred with as much practical certainty as if they had been actually observed. In other cases the inference does not go beyond reasonable probability. But if there are no positive proved facts from which the inference can be made, the method of inference fails and what is left is mere speculation or conjecture.

In our instant case, there is, as pointed out earlier, no evidence from S. Mahendran or the secretary upon which Thomas Lee's alleged belief could be founded.

(2) Another ground relied on by the plaintiffs for alleging Wee's evasion of service was Thomas Lee's belief (which found favour with the learned trial Judge) that Wee had on 10 February, 1993 at about 4.25 p.m. instructed or caused Wee's solicitor, Ivan Wong, not to acknowledge receipt of the Court order dated 9 February 1993. (Paragraph 6(iii) of Thomas Lee's affidavit affirmed on 11 May 1993 and paragraph 4(a)(iii) of the statement dated 12 May 1993 pursuant O. 52 r. 2(2)). The cause papers in the suit including the said Court order were delivered by S. Mahendran to the solicitors' firm (of which Wee was the senior partner) consequent upon the solicitor firm's request for all the cause papers by a letter dated 10 February 1993 transmitted by facsimile. This, incidentally, must necessarily postulate a finding that Wee was in the office at the material time - a point I have already dealt under (1) above.

Thomas Lee based his belief on matters contained in paragraphs 8(a) and 8(b) of his affidavit affirmed on 20 February 1993. Hence it is necessary to consider the said paragraphs 8(a) and 8(b) which are reproduced below:

> 8(2) By a letter dated 10 February 1993, the third defendant's law firm, Messrs. Wee Choo Keong & Faaiz gave notice in writing to the plaintiffs' solicitors that they were authorised to act for the third defendant, Wee Choo Keong, in the action and requested that all relevant cause papers be served on them. A copy of the said letter dated 10 February 1993 is produced before me and exhibited hereto marked as "TL4". The plaintiffs' solicitors did on 10 February 1993 serve all the relevant cause papers including the said order dated 9 February 1993 which was properly indorsed with the notice in Form 87 of the Rules of the High Court 1980 on the said firm. One Ivan Wong Ee Vern, an advocate and solicitor practising in the said firm of Messrs. Wee Choo Keong & Faaiz acknowledged receipt of the covering letter and all the cause papers except the said order date 9 February 1993. Produced before me and exhibited hereto marked "TL5" is the affidavit of service of S. Mahendran affirmed on 12 February 1993. Also produced before me and exhibited hereto marked "TL6" is the affidavit of Leong Kwok Yan affirmed on 12 February 1993 who accompanied S. Mahendran to serve the said order dated 9 February 1993.
>
> (b) By a letter dated 11 February 1993, Messrs. Wee Choo Keong & Faaiz wrote to the plaintiffs' solicitors to confirm receipt of the cause papers mentioned therein but omitted to mention the said order dated 9 February 1993. The plaintiffs solicitors in a letter dated 11 February 1993 replied that notwithstanding the deliberate omission to mention receipt of the said order dated 9 February 1993 the same had in fact been served. Produced before me and exhibited hereto marked "TL7" and "TL8" respectively is the letter of Messrs. Wee Choo Keong & Faaiz dated 11 February 1993 and the plaintiffs' solicitors reply also dated 11 February 1993. By a letter dated 15 February 1993 Messrs. Wee Choo Keong & Faaiz informed the plaintiffs' solicitors that it did not have authority to accept service of the said order dated 9 February 1993 and returned the same. Produced before me and exhibited hereto marked "TL9" is the said letter dated 15 February 1993.

It will be seen from the above paragraph 8 of the affidavit that there is no evidence of Wee instructing or causing his solicitor not to acknowledge the receipt of the said Court order on 10 February, 1993 at about 4.25 p.m. In fact it was the plaintiffs' own case that the Court order had been served. See also M/s. Cheang & Ariff's letter dated 11 February 1993 (Exh. TL8) where it was stated that the said Court order was "deemed served". See further the affidavit of S. Mahendran (process server) affirmed on 12 February 1993 in which he said that he "left the said cause papers including the Court order dated 9 February 1993 with the said Mr. Ivan Wong Ee Vern".

Encik Raja Aziz Addruse, Counsel for Wee also accepted, in his submission, that service of the Court order had been effected on 10 February 1993 at about 4.25 p.m.

In the light of the stand taken by the plaintiffs i.e. that the Court order had been served on 10 February 1993 by leaving a copy thereof with Wee's solicitor, who the learned trial Judge found having been instructed to accept service thereof, it bewildered me how Wee could be guilty of evasion of service by omitting to make reference of the receipt of the Court order in his solicitors' letter dated 11 February 1993 and by returning the said Court order under letter dated 15 February 1993 when the Court order, as conceded by the plaintiffs, had already been served!

Diverting a little, it may be added here that the charge against Wee was that he evaded service of the said Court order on 10 February 1993 at about 4.25 p.m. Yet there is absolutely no evidence from either the process, S. Mahendran, or his companion, Leong Kwok Yan,

that they or either of them had asked for Wee and, more importantly, indicated any wish to serve Wee personally whilst they were in the office of M/s. Wee Choo Keong & Faaiz that afternoon. Wee, on the other hand, in paragraph 2 of his affidavit dated 9 March 1993, had affirmed that he was not evading service and contended that the Court order must be personally served. This, it must be noted, was deposed to more than 2 months before the motion for evasion of service was taken out.

Paragraphs 5 of the affidavits of S. Mahendran and Leong Kwok Yan both affirmed on 12 February 1993 and filed on behalf of the plaintiffs were that it was Ivan Wong who refused to acknowledge the receipt of the Court order. As to this, Ivan explained in paragraph 4 of his affidavit affirmed on 19 May 1993 which reads:

> 4. I took all the cause papers to a large conference table in our library in order to go through each of them as the receptionist table was too small. When I went through the documents, I thought that the said order of Court should be personally served so I consulted the Rules of the High Court, 1980 and it confirmed my view. I then took all the cause papers back to the reception area and I told S. Mahendran about my view that the order must be personally served. He replied that it need not be personally served because our firm has given authority to accept service of all cause papers. In the circumstances, S. Mahendran stated that the cause papers including the said order was deemed served.

There is no dispute from S. Mahendran on the above. In fact, on the evidence, Ivan Wong expressed his view that the Court order should be served on Wee personally, but S. Mahendran maintained otherwise, insisting that service of the Court order on Ivan Wong as Wee's solicitor was good.

On the evidence on record, it appears credible that Ivan Wong was, at the material time, honestly labouring under the belief that the injunction order had to be personally served (which, as a general rule, is the requirement in law). My view is fortified by the fact that the letter dated 10 February 1993 from M/s. Wee Choo Keong & Faaiz to M/s. Cheang & Ariff requesting for service of all cause papers made no express mention of the Court order, but the Court order was brought to be served, quite properly brought, of course. Faced with the situation it is quite probable that Ivan Wong consulted the law. To my mind, his explanation is plausible. Moreover, his belief of the requirement of personal service of the injunction order had some legal merit. In the result, it is my opinion that the belief of Thomas Lee was not grounded on any sound basis.

Moreover, though a person receiving a legal process or Court order is usually enjoined to acknowledge receipt by signing, this is a precautionary measure intended to afford evidence of service and is not an essential part to complete service for the proof of which various means may be adopted e.g. by the process server proving the service. It therefore follows that the refusal to acknowledge receipt of a legal process or Court order is, in itself, no evasion of service particularly where it is the case of the serving party (the plaintiffs in our present case) that service had been effected by leaving the document with the party to be served.

Similarly where, as here, the case of a plaintiff is that the Court order had been served on a defendant, the subsequent return of the Court order by the latter, in itself, does not, in my opinion, constitute evasion of service. If the plaintiff is, in law, right about the validity of the service, the defendant is, in effect, served whether he returns the document served or not.

It is therefore my view that since, as conceded by the plaintiffs in our present case, the Court order had been served, there can be no evasion of service by the omission to mention

receipt of the Court order in the correspondence and by the return of the Court order service had already been effected.

I should also mention that in the statement made pursuant to O. 52 r. 2(2) dated 12 May 1993, 2 of the grounds relied on by the plaintiffs were in the form of affirmative assertions i.e. that the 3rd defendant "did instruct" "did instruct or cause". (See paragraph 4(a)(iii) and paragraph 4(a)(iv) of the statement appearing on page 139 of the Appeal Record), but in Thomas Lee's affidavit made on 11 May 1993 verifying the facts in support of the grounds, the firm affirmative assertions were reduced to a weaker tone by the use of the words "believe" or "verily believe". (See paragraph 6(iii) and paragraph 6(iv) of Thomas Lee's affidavit affirmed on 11 May 1993 appearing on pages 515 and 516 of the Appeal Record)

The last grounds relied on by the plaintiffs in support of this motion for contempt by evasion of service are:

(i) that by their letter dated 11 February 1993 (Exh. TL7) written on Wee's instructions confirming receipt of the cause papers, Wee's solicitors omitted to mention receipt of the Court order dated 9 February 1993;

(ii) Thomas Lee's belief that the omission in (i) above was intentional or wilful;

(iii) that Wee's solicitors by letter dated 15 February 1993 (Exh. TL9) did return the said Court order to the plaintiffs' solicitors.

The evidence in support of the above contentions is in paragraphs 6(v) and 6(vi) of Thomas Lee's affidavit dated 11 May 1993. The related grounds are in paragraphs 4(a)(v) and 4(a)(vi) of the statement dated 12 May 1993 pursuant to O. 52 r. 2(2).

The said paragraphs 6(v) and 6(vi) of Thomas Lee's affidavit dated 11 May 1993 read:

(v) The said solicitors did by a letter dated 11 February 1993 and exhibited in my affidavit affirmed on 20 February 1993 (Enc. 14) and marked as "TL7" confirmed receipt of the cause papers mentioned therein but omitted to mention receipt of the said order dated 9 February 1993.

I verily believe that the said solicitors had intentionally or wilfully omitted any reference to the said order dated 9 February 1993 although the said solicitors had received the same. The said solicitors had already acknowledged receipt of the cause papers by signing on the back page of each of the cause papers on 10 February 1993 (except the said order dated 9 February 1993) and on the covering letter of the plaintiffs' solicitors exhibited as "SM6" In the affidavit of S. Mahendran affirmed on 12 February 1993. There was therefore no necessity for such a letter ("TL7") except to intentionally create evidence to provide that the said order was not served by writing the letter aforesaid. In any event the said solicitors by their letter dated 15 February 1993 and exhibited in my affidavit affirmed on 20 February 1993 (Enc. 14) and marked as "TL9" clearly shows that the omission was wilful and intentional. The letter "TL9" was written in reply to the plaintiffs' solicitors' letter dated 11 February 1993 and marked as "TL8" in the same affidavit. From the letter "TL9", it is noted that the said solicitors had acted at all material times under the instructions of the third defendant which instructions must by necessity include the sending of the letter "TL7".

(vi) The said solicitors did by their letter dated 15 February 1993, marked as "TL9" and exhibited to my affidavit affirmed on 20 February 1993 (Enc. 14) returned the said order dated 9 February 1993 to the plaintiffs' solicitors.

The 2 letters dated 11 February 1993, (Exh. "TL-7") and 15 February 1993 (Exh. "TL9") and the plaintiff solicitors' letter dated 11 February 1993 (Exh. "TL-8") are reproduced below:

(Letter from M/s. Wee Choo Keong & Faaiz)

Date: 11 February 1993

Messr. Cheang & Ariff
Advocates & Solicitors
39 Court 39 Jalan Yap Kwan Seng
50450 Kuala Lumpur

By Fax and Post

Dear Sirs

KL High Court Civil Suit No. S4-22-75-93 MBf Holdings Berhad & MBf Finance Berhad v. Houng Hai Kong, Loi Hean Sso & Wee Choo Keong

We refer to your letter of 10 February 1993 and confirm receiving the following documents:

1. Writ of Summons dated 9 February 1993:
2. Summons in chambers (*Ex parte*) dated 9 February 1993; and
3. Supporting affidavits of Patrick Chen Yee Ching and Thomas Lee Khoon Seng both affirmed on 9 February 1993.

Yours faithfully,

(Sgd.)

(Letter from M/s. Cheong & Ariff)

11 February 1993

M/s. Wee Choo Keong & Faaiz
Advocates & Solicitors
20th Floor Suite 20.3
Bangunan Kuwasa
Jalan Raja Laut
50746 Kuala Lumpur

Dear Sirs

KL High Court Civil Suit No: S4-22-75-93 MBf Holdings Berhad & MBf Finance Berhad v. Houng Hai Kong, Loi Hean Sso & Wee Choo Keong

Thank you for your facsimile dated 11 February 1993.

In all the circumstances, it did not surprise us that your client would instruct you to send the facsimile confirming receipt of all cause papers except the order of Court. The cause papers mentioned in your letter was served on your firm pursuant to your letter dated 10 February 1993. These were served by our clerk, Mr. S. Mahendran in the presence of Mr. Leong Kwok Yan who acompanied the former. Mr. Ivan Wong of your office acknowledge receipt of all the cause papers but refused to acknowledge receipt of the order and whereupon, a copy of the order together with the rest of the cause papers were left at the receptionist's table. Mr. Ivan Wong's attention was drawn to the order and was also told that notwithstanding the fact that he had refused to acknowledge the order, the order is deemed served.

We should point out that your office had acknowledged receipt of our letter and in which the order was specifically mentioned. Additionally, Mr. Ivan Wong's conduct is only explicable by facts which are peculiarly within his knowledge, namely he only refused to acknowledge receipt of the order after he had gone back into the office from the reception area and presumably decided to refuse acknowledgment of the order after he had conferred with his superior. Here, Mr. Ivan Wong had in his physical custody all the cause papers and the order when he went into the office proper from the reception area and our process servers were

specifically told, when they first arrived, that your client, Mr. Wee Choo Keong, was in the office though the receptionist was later contradicted by the secretary of Mr. Wee.

Our clients will not hesitate to take such action as may be appropriate to strictly enforce the Court order dated 9 February 1993. A copy of the order is enclosed again but not in derogation of any of our statements set forth above.

Yours faithfully,

(Sgd.)

(Letter from M/s. Wee Choo Keong & Faaiz)

Date: 15 February 1993

Messrs Cheang & Ariff
Advocates & Solicitors
39 Court
39 Jalap Yap Kwan Seng
50450 Kuala Lumpur

BY HAND

Dear Sirs

KL High Court Civil Suit No: S4-22-75-93
MBf Holdings Berhad & MBf Finance Berhad v.
Houng Hai Kong, Loi Hean Sso & Wee Choo Keong

We refer to your letter of 11 February 1993 and our letter of even date.

We do not wish to enter into a long debate with you over the sequence of the events as we feel that it is a futile exercise.

Please be informed that we have no authority to accept service of the order. Therefore, we return a copy of the order to you.

Yours faithfully

(Sgd.)

It is relevant to note that:

(1) In M/s. Cheong & Ariff's letter dated 11 February 1993, the following sentences and word were used: "The cause papers ... was served on your firm," " ... the order is deemed served" and "presumably"; and

(2) M/s. Cheang & Ariff's said letter dated 11 February 1993 and M/s. Wee Choo Keong & Faaiz's reply dated 15 February 1993 must be read together. Thus read, it is clear that the last paragraph of the said reply dated 15 February 1993 about having no authority to accept service relates to the dispute between the parties as to the validity of the service of the injunction Court order on Mr. lvan Wong on 10 February 1993 at about 4.25 p.m. In other words, the dispute was on the validity of the service of the Court order: whereas the contention of M/s. Cheang & Ariff, acting for the plaintiffs, was that the service of the Court order on Mr. Ivan Wong in the circumstances as occurred on 10 February, 1993 at about 4.25 p.m. (the circumstances are shown in the relevant affidavit evidence in our present case) was good service, M/s. Wee Choo Keong & Faaiz, acting for Wee, maintained otherwise. It was under such circumstances that the last paragraph of the said reply dated 15 February, 1993, was written, and it ought to be read with such circumstances in mind.

It cannot be doubted that the sending of the 2 letters dated 11 February 1993 (Exh. "TL7") and dated 15 February 1993 (Exh. "TL9") was intentional and wilful. The question is: can they constitute valid grounds for holding that the plaintiffs' charge of evasion of service of the Court order dated 9 February 1993 on the part of Wee proved beyond reasonable doubt? I think not. The circumstances prevailing at the time of service of the Court order on 10 February 1993 at about 4.25 p.m. and the then state of mind of the parties are material for consideration.

Firstly, as conceded by the plaintiffs, the Court order had been served (see Exh. LT8; paragraph 8(a) and (b) of Thomas Lee's affidavit dated 20 February 1993). That being so, no amount of omissions or failures to mention receipt of the Court order or returning the Court order to the plaintiffs' solicitor could constitute evasion of service for the simple reason that service, as conceded by the plaintiffs, had already been effected. I have dealt with this earlier.

Secondly, Ivan Wong, in response to the motion, had explained in paragraphs 4 and 6 of his affidavit dated 19 May 1993 that the reasons he refused to accept service of the Court order on 10 February 1993 and returned it was that according to the Rules of the High Court he had no authority to accept service of an order of personal character and that his view was that under the law it had to be served personally on Wee. An honest and reasonable belief in the existence of circumstances which, if true, would make an act for which a defendant is charged an innocent act, will amount to good defence. In view of Ivan Wong's evidence above, the omission or failure to mention receipt of the Court order (in the sense of accepting valid service) in Wee's solicitors' letter dated 11 February 1993 (Exh. "TL7") and the return of the Court order vide letter dated 15 February 1993 (Exh. "TL9") are, at least, equally consistant with the probability that the omission or failure to mention the Court order in the letter and the return thereof relate to genuine dispute of the propriety of service on point of law rather than to evasion of service of the Court order, which, in any event, on the plaintiffs' own contention, as pointed out earlier, had already been served. As observed by Lord Denning M.R. *In re Bramblevale Ltd.* [1970] 1 Ch. 128 at 137 E-F:

> Where there are two equally consistent possibilities open to the Court, it is not right to hold that the offence is proved beyond reasonable doubt.

One last point, the statement pursuant to O. 52 r. 2(2) alleged Wee giving instructions to write the letter dated 11 February 1993 between 10 February 1993 and 15 February 1993, in normal circumstances would instructions be given retrospectively i.e. between 12 February 1993 and 15 February 1993 after the letter was written? At least there ought to have been some explanation from the plaintiffs.

It is incumbent upon the plaintiffs to prove beyond reasonable doubt not only that Wee at the material time on 10 February 1993 about 4.25 p.m. was in his office but also that the alleged acts and/or omissions by Ivan Wong were done on the instructions of Wee and were sufficient to constitute evasion of service of the said Court order on the part of Wee. After careful deliberation of submissions by Counsel for both sides and detailed examination and analysis of all relevant evidence adduced in the form of affidavits and exhibits, I was of the view that the evidence, taken in totality, was insufficient to prove or fell short of proving to the criminal standard i.e. beyond reasonable doubt the charge of contempt by evasion of service of the Court order dated 9 February 1993 as alleged.

I would therefore allow the appeal.